ALLIANCE BANK MALAYSIA BHD

v.

MCK DEVELOPMENT SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[ORIGINATING SUMMONS NO: 24-2994-2001 (4)]
10 DECEMBER 2004

LAND LAW: *Charge - Order for sale - Vesting order - Whether properly registered under s. 420 National Land Code - Whether charged properties vested in plaintiff - Whether plaintiff had locus standi to commence foreclosure proceedings - Banking and Financial Institutions Act 1989, s. 50(3), (6)(a) - National Land Code, s. 420*

This was an appeal against the decision of the learned registrar dismissing the defendant's application to strike out an originating summons filed by the plaintiff for an order for sale of certain charged properties, which had been used to secure overdraft facilities granted by one Sabah Bank Bhd to the defendant. The High Court made a vesting order under s. 50 of the Banking and Financial Institutions Act 1989 ('BAFIA') by giving effect to various 'business merger agreements' between the plaintiff and four other parties including Sabah Bank Bhd. Pursuant to this vesting order, all or any security held immediately before the transfer date *ie*, 31 December 2000, by Sabah Bank Bhd as security for the payment or discharge of any liability of any person, on and from the transfer date, should be held by the plaintiff, and to the extent of those liabilities, be available to the plaintiff as security for the payment or discharge of those liabilities.

The plaintiff issued a letter terminating and recalling the overdraft facilities and demanding payment; subsequently, it issued a Form 16D notice against the defendant. The plaintiff then filed an originating summons and, on 13 August 2002, registered the vesting order at the land registry pursuant to s. 420(1) of the National Land Code ('NLC'). The defendant submitted that the plaintiff was not the chargee of the charged properties until 13 August 2002 and, therefore, had no *locus standi* to commence the foreclosure proceedings. The defendant further averred that vesting of the charged properties in the plaintiff only took effect once it was registered under s. 420 of the NLC, and that s. 50(6)(a) of the BAFIA required such vesting under

the NLC to be done immediately after the vesting order was granted. Hence, the Form 16D notice was ineffective, null and void, and the entire foreclosure proceedings were void for want of jurisdiction.

Held (dismissing the appeal):

[1] The vesting order was made pursuant to s. 50(3) of the BAFIA, and upon an order being made for the transfer of the properties to the plaintiff, by virtue of the vesting order: (i) the properties should, on and from 31 December 2000, become vested in or held by the plaintiff; (ii) the order should have effect according to its terms notwithstanding anything in law or in any rule of law; and (iii) the order should be binding on any person thereby affected, regardless of whether the person was not a party to the proceedings or had no notice of the proceedings under s. 50 of the BAFIA. Thus, effective from the transfer date *ie*, 31 December 2000, stipulated in the vesting order, the charged properties had become automatically vested in the plaintiff. (pp 80 g-h & 81 a-b)

[2] Parliament enacted s. 50(6)(a) of the BAFIA merely for the purpose of laying down the subsequent administrative procedures to be taken for the formal registration of the vesting order at the relevant land registry in accordance with s. 420 of the NLC. It was irrelevant and of no consequence in this matter that the vesting order had been registered formally at the land registry after the commencement of the foreclosure proceedings. The registration of the vesting order under s. 420 of the NLC was not a pre-condition to the commencement of the charge action as s. 50(3) of the BAFIA expressly provided that notwithstanding the provisions in any law, the charged properties should be vested in the plaintiff automatically on 31 December 2000. (p 81 e-h)

[3] Clearly, in the eyes of the law, the plaintiff was a chargee as at 26 November 2001 and, thus, did have the *locus standi* to issue the Form 16D notice to the defendant and subsequently commence the foreclosure proceedings. (p 82 b)

Case(s) referred to:
Phileoallied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(foll)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 50(3), (6)(a)
National Land Code, ss. 254, 420(1), (2), Form 16D

For the appellant/defendant - Saranjit Singh; M/s Vasdev Bakshani & Assoc
For the respondent/plaintiff - Gheethabai Kunchiran; M/s Tay, Tee & Nasir

Reported by Suresh Nathan

JUDGMENT

Azahar Mohamed JC:
This is an appeal against the judgment of the learned registrar, dismissing with costs the defendant's application in encl. 11 to strike out the originating summons which was filed on 24 December 2001 by the plaintiff for an order for sale of the charged properties.

The facts relevant to the appeal are as follows. In July 1996 Sabah Bank Berhad had granted the defendant overdraft facilities. The overdraft facilities were secured by the execution of the memorandum of charges in favour of Sabah Bank Berhad on 19 July 1996 and 2 January 1997 on the properties. On 21, 2000 a vesting order was made by the High Court at Kuala Lumpur by giving effect to various 'business merger agreements' between Multi-Purpose Bank Bhd and 4 others Banks and Financial Institution including Sabah Bank Bhd. The vesting order made pursuant to s. 50 of the Banking and Financial Institutions Act 1989 (BAFIA), *inter alia*, ordered that all and any security held immediately before the transfer date ie, 31 December 2000 by Sabah Bank Bhd as security for the payment or discharge of any liability of any person, on and from the transfer date, shall be held by Multi-Purpose Bank Bhd and to the extent of those liabilities, shall be available to Multi-Purpose Bank Bhd as security for the payment or discharge of those liabilities. On 21 January 2001 Multi-Purpose Bank Bhd changed its name to Alliance Bank Malaysia Berhad, the plaintiff. On 30 March 2001 the plaintiff issued a letter to the defendant terminating and recalling the overdraft facilities and demanding the payment of RM13,736,295.89. On 26 November 2001 the plaintiff issued a Form 16D Notice pursuant to s. 254 of the National land Code 1965 (NLC) against the defendant. The plaintiff on 24 December 2001 filed the originating summons. On 13 August 2002 the vesting order was registered at the land registry in Johore Bahru pursuant to s. 420(1) of NLC.

It was submitted by the learned counsel for the defendant that the plaintiff was not the chargee of the charged properties until 13 August 2002 and therefore the plaintiff had no *locus standi* to commence the foreclosure proceedings. It was argued that vesting of the charged properties in the plaintiff only take effect once it was registered under s. 420 of NLC and that s. 50(6)(a) of BAFIA required such vesting under the NLC to be done immediately after the vesting order was granted. Learned counsel further argued that the 16D Notice was therefore ineffective, null and void and the entire foreclosure proceedings commenced by the plaintiff was void for want of jurisdiction at the very outset.

Before turning to consider and examine these arguments, I should perhaps at this stage state that s. 254 of NLC entitles a chargee to issue and serve on the chargor a notice in Form 16D, *inter alia*, specifying the breach in question and requiring the breach to be remedied by the chargor. A chargee has the statutory right to foreclose the charged property in the event the chargor breaches or does not comply with the requisite notices issued by the chargee under the NLC. Another provision which I think need to be referred now is s. 50(3) of BAFIA which reads as follows:

> Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transfer or, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms not withstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

I should perhaps reiterate that the vesting order was made pursuant to abovementioned provision of BAFIA. In my view, when the provision is carefully analysed in the context of the present case, it will be found that upon an order being made for the transfer of the properties to the plaintiff, than by virtue of the vesting order:

a. That properties shall, on and from 31 December 2000, become vested in or held by the plaintiff; and

b. The order shall have the effect according to its terms notwithstanding anything in any law or in any rule of law; and

c. The order shall be binding on any person thereby affected, regardless that the person is not a party to the proceedings or had no notice of the proceedings under s. 50 of BAFIA.

Thus, it my view effective from the transfer date ie, 31 December 2000, as stipulated in the vesting order, the charged properties became automatically vested in the plaintiff.

One further point: learned counsel for the defendant relied heavily on s. 50(6)(a) of BAFIA which reads as follows:

> Where an order of the High Court under subsection (1) vests any alienated land, or any share or interest in any alienated land, in the transferee;
>
> (a) the High Court shall, where such alienated land is in West Malaysia, pursuant to section 420(2) of the National Land Code, cause a copy of the order to be served on the Registrar of Titles or the Land Administrator, as the case may be, immediately after the making of the order so that the Registrar of Titles or the Land Administrator, as the case may be, gives effect to the provisions of the said section 420(2), (3) and (4).

Learned counsel argued that the provision specifically provides for the compliance of the requirements under s. 420(2) of NLC, so as to enable the vesting of alienated land to be legally effective. In other words, according to learned counsel, s. 50(6)(a) preserves the obligatory provisions of s. 420 of NLC. With respect, I am unable to agree with these arguments. In my view, parliament enacted s. 50(6)(a) merely for the purpose of laying down the subsequent administrative procedures to be taken for the formal registration of the vesting order at the relevant land registry in accordance with s. 420 of NLC. I can see no ambiguity in the said provision. To my mind, it is irrelevant and of no consequence in this matter that the vesting order had subsequently been registered formally at the land registry after the commencement of the foreclosure proceedings. In my view, the registration of the vesting order under s. 420 of NLC is not a pre-condition to the commencement of the charge action, as I have stated at the outset that s. 50(3) of BAFIA expressly provides that notwithstanding the provisions in any law the charged properties shall be vested in the plaintiff automatically on 31 December 2000. Thus, with the vesting order the plaintiff is not required to carry out any further administrative act, for instance registering the order with the land registry, in order to enforce the charge. In my judgment, s. 50(3) does not postulate registration of the vesting order as a prerequisite to the commencement of the foreclosure proceedings. I do not think that there is any justification or warrant to read s. 50(6) of BAFIA in the manner as argued by the learned counsel.

In my opinion, the views expressed by His Lordship Low Hop Bing J in the High Court case of *Phileoallied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 accurately state the true meaning and effect of s. 50(3) of BAFIA although it appears that the provision of s. 50(6) was not considered by His Lordship.

In the matter before me, the vesting order in clear and unambiguous terms stated that with effect from 31 December 2000 the charged properties became automatically vested in the plaintiff. Clearly, in the eyes of the law, the plaintiff was a chargee as at 26 November 2001 and thus did have *locus standi* to issue the 16D Notice to the defendant and subsequently to commence the foreclosure proceedings.

Accordingly, I hold that the defendant's application to strike out the originating summons is devoid of any merits. In the result, for the reasons already given, the appeal was dismissed with costs.